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ELASTICSEARCH, INC. and
10 ELASTICSEARCH B.V.

11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**
13 **OAKLAND DIVISION**
14

15 ELASTICSEARCH, INC., a Delaware
corporation, and ELASTICSEARCH B.V., a
16 Dutch corporation,

17 Plaintiffs,

18 v.

19 FLORAGUNN GmbH, a German corporation,

20 Defendant.
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Case No. 4:19-cv-05553-YGR (AGT)

**DECLARATION OF DAVID R.
EBERHART IN SUPPORT OF
PLAINTIFFS' MOTION FOR
SANCTIONS AGAINST FLORAGUNN
REGARDING HENDRIK SALY**

1 I, David R. Eberhart, declare:

2 1. I am a partner at O'Melveny & Myers LLP and counsel of record for plaintiffs
3 Elasticsearch, Inc. and elasticsearch B.V (collectively, "Elastic"). I make this declaration based
4 on my own personal knowledge and review of the documents attached hereto. If called as a
5 witness, I could and would testify under oath to the matters set forth herein.

6 2. Attached hereto as **Exhibit A** is a true and correct copy of Exhibit 185 from the
7 March 9, 2021 30(b)(6) deposition of Jochen Kressin in this case.

8 3. Attached hereto as **Exhibit B** is a true and correct copy of excerpts of the
9 transcript of the March 9, 2021 deposition of Jochen Kressin.

10 4. On November 25, 2020, my colleague James Rothstein, also counsel for Elastic,
11 emailed counsel for Defendant floragunn GmbH ("floragunn") to schedule a deposition for
12 Hendrik Saly. A true and correct copy of that email is attached hereto as **Exhibit C**.

13 5. On November 30, 2020, floragunn informed counsel for Elastic for the first time
14 that (1) Mr. Saly was on leave and hence unable to be deposed; (2) he had been on leave since
15 March 2020; and (3) floragunn expected his leave would continue at least through the close of
16 fact discovery (then January 29, 2021).

17 6. On December 7 and 14, 2020, floragunn produced by email a sequence of
18 certificates. A true and correct copy of these emails, as well as the certificates provided and
19 certified translations thereof, are attached hereto as **Exhibits D** and **E**.

20 7. Attached herto as **Exhibit F** is a true and correct copy of Exhibit 164 from the
21 March 1, 2021 deposition of Jochen Kressin in this matter. Attached hereto as **Exhibit G** is a true
22 and correct copy of a certified translation of the document attached and a Translation Certificate
23 certifying that the translation at Exhibit F is true and accurate.

24 8. On December 23, Elastic issued to floragunn a request for production for all
25 documents supporting Mr. Saly's alleged unavailability. A true and correct copy of the request for
26 production is attached hereto as **Exhibit H**.

1 9. Attached hereto as **Exhibit I** is a true and correct copy of floragunn's Responses to
2 Elastic's Fifth Requests for Production.

3 10. On January 25, 2021, I had a telephone call with counsel for floragunn. I asked
4 counsel for floragunn if Mr. Saly was available to be deposed. Counsel for floragunn stated that
5 he expected that Mr. Saly would not be available to be deposed.

6 11. On February 5, 2021, I emailed counsel for floragunn requesting Mr. Saly's leave
7 certificate for periods after January 27, 2021. A true and correct copy of that email is attached
8 hereto as **Exhibit J**.

9 12. On February 9, 2021, counsel for floragunn emailed me in pertinent part that
10 "Floragunn expects to receive a certificate confirming Mr. Saly's [redacted] inability to work for
11 a period after January 27." A true and correct copy of that email is attached hereto as **Exhibit K**.

12 13. Attached hereto as **Exhibit L** is a true and correct copy of Exhibit 394 from the
13 October 28, 2021 deposition of Jochen Kressin in this matter.

14 14. Attached hereto as **Exhibit M** is a true and correct copy of excerpts of the
15 transcript of the October 28, 2021 deposition of Jochen Kressin.

16 15. On or about February 11, 2021, counsel for the parties began discussing a
17 stipulation to address Mr. Saly's purported unavailability and preventing any prejudice to Elastic
18 based on his purported unavailability and floragunn's representation that Mr. Saly would not be
19 available for deposition before the close of fact discovery.

20 16. On March 16, 2021, counsel for floragunn emailed me, producing multiple
21 certificates to Elastic. A true and correct copy of that email and the certificates provided is
22 attached hereto as **Exhibit N**.

23 17. On May 5, 2021, Mr. Rothstein requested by email a meet and confer with counsel
24 for floragunn regarding issue sanctions based on floragunn's misrepresentations regarding Mr.
25 Saly's condition and its failure to produce him for deposition. A true and correct copy of that
26 email is attached hereto as **Exhibit O**.

1 18. On May 6, 2021, floragunn produced a leave certificate for Mr. Saly for the period
2 February 17, 2021, through May 18, 2021. A true and correct copy of the certificate produced to
3 Elastic, as well as a certified translation of that letter, is attached hereto as **Exhibit P**.

4 19. Also on May 6, 2021, floragunn produced a letter dated April 12, 2021. A true and
5 correct copy of the letter provided to Elastic, as well as a certified translation of that letter, is
6 attached hereto as **Exhibit Q**.

7 20. On May 20, 2021, floragunn produced a one-line letter to Elastic. A true and
8 correct copy of the letter provided to Elastic, as well as a certified translation of the letter
9 provided by floragunn which filed as Exhibit D to its June 22, 2021, letter to the Court (Dkt. 112),
10 is attached hereto as **Exhibit R**.

11 21. On June 21, 2021, counsel for the parties had a meet and confer call pursuant to
12 the Court's June 11, 2021 order (Dkt. 112). During the meet and confer, floragunn's counsel for
13 the first time informed Elastic that it terminated Mr. Saly's employment.

14 22. On June 21, 2021, floragunn produced to Elastic three certificates dated April 21,
15 May 19, and June 16, 2021. A true and correct copy of that email, including the certificates, is
16 attached hereto as **Exhibit S**.

17 23. Attached hereto as **Exhibit T** is a true and correct copy of Exhibit 390 from the
18 October 28, 2021 deposition of Jochen Kressin in this case.

19 24. Attached hereto as **Exhibit U** is a true and correct copy of Exhibit 391 from the
20 October 28, 2021 deposition of Jochen Kressin in this case.

21 25. Attached hereto as **Exhibit V** is a true and correct copy of Exhibit 395 from the
22 October 28, 2021, deposition of Jochen Kressin in this case.

23 26. Attached hereto as **Exhibit W** are true and correct captures of tweets from Mr.
24 Saly's Twitter account.

25 27. A true and correct copy of the website for Work + Health Service is attached
26 hereto as **Exhibit X**.

28. Attached hereto as **Exhibit Y** is a true and correct copy of floragunn's 2021 first quarter financial statement as produced to Elastic in this litigation.

29. Attached hereto as **Exhibit Z** is a true and correct copy of floragunn's 2020 financial statement as produced in this litigation as DEF047682.

30. Attached hereto as **Exhibit AA** is a true and correct copy of excerpts of the transcript of the March 1, 2021, deposition of Jochen Kressin.

31. Attached hereto as **Exhibit BB** is a true and correct copy of files obtained from the German Company Registers regarding the entity go-ffwd GmbH, and English translations of same, and which Elastic previously filed as Dkt. 129 Exs. A-C.

32. Attached hereto as **Exhibit CC** is a true and correct copy of excerpts of the transcript of the February 17, 2021 deposition of Uri Bones in this matter.

33. At the September 17, 2021, hearing on a related discovery dispute at which I appeared, floragunn's counsel Michael Kwun stated that floragunn had used a document that Mr. Saly prepared with Mr. Kressin to inform its Answers in this matter.

34. Attached hereto as **Exhibit DD** is a true and correct copy of Elastic's Second Set of Requests for Admission to floragunn, served on December 23, 2020.

35. Attached hereto as **Exhibit EE** is a true and correct copy of the January 22, 2021 email from floragunn to Elastic serving floragunn's responses to Elastic's Second Set of Requests for Admission.

36. Attached hereto as **Exhibit FF** is a true and correct copy of Exhibit 167 to the March 1, 2021 deposition of Jochen Kressin, which is floragunn's responses to Elastic's Second Set of Requests for Admission.

I declare under penalty of perjury that the foregoing is true and correct. Executed this November 12, 2021, at San Francisco, California.

By: /s/ David R. Eberhart
David R. Eberhart